FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
William D. Mason	)	
Friends of William D. Mason and	)	MUR 5604
Thomas Regas, in his official capacity as treasurer	)	
Kerry-Edwards 2004, Inc. and	)	
Robert Farmer, in his official capacity as treasurer	)	

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STATEMENT OF REASONS OF CHAIRMAN MICHAEL E. TONER AND COMMISSIONERS DAVID M. MASON AND HANS A. von SPAKOVSKY

The matter arises from a complaint filed by the Republican National Committee regarding campaign material distributed by the campaign of a candidate seeking re-election to a local office.[1]

The Commission voted unanimously to accept some recommendations of the Office of General Counsel ("OGC"), reject others, take no further action, and close the file.[2] We write to set forth reasons for rejecting OGC's recommended findings regarding the campaign material.

I. BACKGROUND

When Cuyahoga County, Ohio, prosecutor William Mason sought re-election in 2004, his campaign distributed a handbill featuring himself and Senator John Kerry, a 2004 presidential candidate.[3] The complaint alleges:

- At least half the cost of the campaign material was a contribution, *see generally* 2 U.S.C. § 431(8)(A) (2002),[4] to the Kerry campaign in violation of the Presidential Election Campaign Fund Act. *See* 26 U.S.C. § 9003(b)(2) (1976).

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[1] Compl (Nov. 1, 2004).

[2] Voting affirmatively were Chairman Toner, Vice Chairman Lenhard, and Commissioners Mason, von Spakovsky, Walther, and Weintraub

[3] First Gen Counsel's Report ("GCR") at 3-4 (Aug 30, 2006), *see id* Attach. 1.

[4] *See generally FEC v Survival Education Fund,* 65 F.3d 285, 295 (2d Cir 1995)

- The campaign material was an expenditure, *see generally* 2 U.S.C. § 431(9)(A)(i),[5] whose federal share exceeded $1,000, thereby making the Mason campaign a federal political committee. *See generally id.* § 431(4)(A).[6]
- The disclaimer on the campaign material was inadequate. *See generally id.* § 441d (2002).[7]

The handbill, being a *hand*bill, was not mailed. Rather, it was distributed by hand.[8] In this matter, the hands were those of volunteers,[9] and the Mason campaign[10] had more than adequate federally permissible money to cover the portion of the handbill featuring Senator Kerry.[11]

II. DISCUSSION

A. Contribution and Expenditure

The Federal Election Campaign Act ("FECA") defines "contribution" and provides several exceptions. *See id.* § 431(8)(A), (B). Among them is the so-called "coattail exemption," which exempts the payment by federal, state or local candidates, or their authorized committees, of the costs of (1) campaign materials that (2) include information on, or refer to, another candidate and (3) are used in connection with volunteer activities, as long as (4) the payment is with money subject to FECA limits[12] and prohibitions.[13] *Id.* § (B)(x); *cf. id.* § (B)(ix) (similar exception for state or local party committees). Such campaign materials, include, for example, "pins, bumper stickers, *handbills,* brochures, posters, and yard signs," but do not include "the use of broadcasting, newspapers, magazines, billboards, direct mail, or similar types of *general public communication or political advertising* ...." 2 U.S.C. § 431(8)(B)(x) (emphasis added). Commission regulations clarify that for the exception to apply, the payment must be for

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[5] *See generally McConnell v FEC,* 540 U.S. 93, 191-92 (2003), *cited in Anderson v Spear,* 356 F.3d 651, 663-66 (6th Cir.), *cert denied,* 543 U.S. 956 (2004); *FEC v Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 248-49 (1986) (citing *Buckley v Valeo,* 424 U.S. 1, 42, 44 n 52. 80 (1976)).

[6] *See generally Buckley,* 424 U.S. at 78-80.

[7] GCR at 2.

[8] *Id* at 4 (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed 2000) (defining "handbill" as a "printed sheet or pamphlet distributed by hand")).

[9] *Id* at 5 (noting that the only cost of the handbill was a vendor's consulting fee).

[10] The Mason campaign was not a political committee under FECA, *e g , id* at 5, 7, so to avoid confusion, this statement of reasons ("SOR") does not refer it as the Mason "committee."

[11] *Id.* at 5

[12] 2 U.S C. § 441a(a), (c). (f) (2002)

[13] *Id* § 441b(a) (2002)

campaign materials for a candidate's own campaign. *See* 11 C.F.R. § 100.88 (2003). They also clarify that such payments are not contributions to the campaign of the *other* candidate, *i.e.*, the candidate about whom the campaign materials contain information or to whom they refer. *See id.*

Commission regulations also provide a parallel exception from the definition of "expenditure," 2 U.S.C. § 431(9)(A), which establishes that the payment is not an expenditure on behalf of the *other* candidate. *See* 11 C.F.R. § 100.148 (2003); *cf.* 2 U.S.C. § 431(9)(B)(viii), (ix) (similar exceptions for state or local party committees).

Thus, when a candidate or a candidate's authorized committee uses money subject to FECA limits and prohibitions to pay for a handbill for the candidate's own campaign; the handbill includes information about, or refers to, another candidate; and volunteers distribute the handbill, the payment is not a contribution to the other candidate. *See* 2 U.S.C. § 431(8)(B)(x); 11 C.F.R. § 100.88. Nor is it an expenditure on behalf of the other candidate. *See* 11 C.F.R. § 100.148.

Because the Mason campaign handbill meets these criteria, it is not a contribution, nor is it an expenditure on behalf of the Kerry campaign. As OGC observes, the absence of a contribution or expenditure in this matter disposes of the alleged violation of the Presidential Election Campaign Fund Act, *see* 26 U.S.C. § 9003(b)(2), and the allegation that the Mason campaign was a political committee. *See* 2 U.S.C. § 431(4)(A).[14]

B. Disclaimer

As to the complaint, this leaves only the allegation that the disclaimer on the handbill was inadequate. *See generally* 2 U.S.C. § 441d. OGC asserts that the handbill required a disclaimer under 2 U.S.C. § 441d(a)(2), because it contained express advocacy not under Section 100.22(a) of Commission regulations but under Section 100.22(b). *See* 11 C.F.R. § 100.22 (1995).[15] However, express advocacy requires a disclaimer only when it is a public communication in the first place. *See* 11 C.F.R. § 110.11(a)(2) (2002), *amended,* 71 FED. REG. 18589, 18613 (2006).[16] As discussed below, the handbill was not a "public communication," *infra* at 4-5, so no disclaimer was necessary even if the handbill contained express advocacy.

C. Public Communication and Reporting Requirements

This matter does not involve "any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the

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[14] *See* GCR at 4-5.

[15] *Id* at 8-10

[16] The 2006 regulation, which does not apply here, because this matter concerns events in 2004, *see In re Graf for Congress,* Matter Under Review 5526, SOR of Chairman Toner, Vice Chairman Lenhard & Comm'rs Mason, von Spakovsky, Walther & Weintraub at 3 n 8 (F E C Nov 27, 2006), *available at* http://eqs.sdrdc com/eqsdocs/0000588D.pdf (visited Dec. 6, 2006), is the same as the 2002 regulation in this respect. *See* 11 C.F R. § 110.11(a), (a)(2) (2006).

general public," 2 U.S.C. § 431(22), yet OGC asserts the handbill was a form of "general public political advertising," so it was a "public communication." *See id.* OGC then asserts this public communication promoted or supported Senator Kerry, so it was Type 3 federal election activity ("FEA"), *see id.* § 431(20)(A)(iii), which meant that in paying for it, the Mason campaign was permitted to use only federal money, *i.e.,* money subject to FECA limits, prohibitions, and *reporting*[17] requirements. *See id.* § 441i(f)(1) (2002); 11 C.F.R. § 300.2(g) (2006) (defining "federal funds"); *cf. id.* § 300.2(k) (defining "non-federal funds").[18] Because the Mason campaign was not a political committee under FECA, *see id.* § 431(4)(A), it did not have to report to the Commission as a political committee would. *See id.* § 434(a)(4); *id.* § 431(6) (defining "authorized committee"). Nevertheless, presuming that the money for the handbill was still subject to reporting requirements, *see generally id.* § 441i(f)(1), and because there was no report from the Mason campaign, OGC recommended finding reason to believe that the Mason campaign violated Section 441i(f), so that OGC could determine the amount in violation, *i.e.,* the amount spent on the handbill and not reported.[19]

This approach has two errors.

1. Public Communication

First, this matter does not involve a "public communication."

FECA places "handbills" and "general public communication or political advertising" in opposing categories. *See* 2 U.S.C. § 431(8)(B)(ix), (8)(B)(x), (9)(B)(viii), (9)(B)(ix); *see also* 11 C.F.R. §§ 100.88, 100.148. Therefore, a "handbill" is not a "general public communication or political advertising" and is not a "public communication."

In addition, as previously noted, *supra* at 2-3, the "coattail exemption" creates two categories of communications – "pins, bumper stickers, handbills, brochures, posters and yard signs" on the one hand, and "broadcasting, newspapers, magazines, billboards, direct mail or similar types of general public communication or political advertising" on the other. *See* 2 U.S.C. § 431(8)(B)(x); 11 C.F.R. §§ 100.88, 100.148. The definition of "public communication" – "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising," 2 U.S.C. § 431(22) – is similar to the latter category in the "coattail exemption," except for "telephone bank to the general public," which is not at issue here:

[17] 2 U.S.C. § 434 (2004); *see also id* § 433 (1980) (registration requirements).

[18] GCR at 6-7.

[19] *See id* at 6-8.

Latter Category of 2 U.S.C. § 431(8)(B)(x)	Public Communication definition in 2 U.S.C. § 431(22)
• broadcasting communication	• broadcast, cable or satellite
• newspapers	• newspaper
• magazines	• magazine
• billboards	• outdoor advertising facility
• direct mail	• mass mailing
	• telephone bank to the general public
• similar types of general public communication or political advertising	• any other form of general public political advertising

It follows that since "handbills" are not in the latter category of 2 U.S.C. § 431(8)(B)(x), they are also not "public communications." *Cf. id.* § 431(8)(B)(x); 11 C.F.R. §§ 100.88, 100.148. This is so regardless of whether the handbills promote, support, attack, or oppose ("PASO") a candidate, *see* 2 U.S.C. § 431(8)(B)(x) (not mentioning PASO); 11 C.F.R. §§ 100.88, 100.148 (same), because there "is no content requirement in the ... definition of 'public communication.'" Internet Communications, 71 FED. REG. 18589, 18595 (2006) (amending 11 C.F.R. § 100.26 (2002)).

While it is true that the explanation and justification in a previous rulemaking suggested that handbills are among the "publicly disseminated" public communications regulated by 11 C.F.R. § 109.21(c)(4)(ii) (2003), *see* Coordinated & Independent Expenditures, 68 FED. REG. 421, 429 (2003),[20] the Commission has amended this regulation such that the 2003 statement regarding the former regulation no longer applies. *Compare* 11 C.F.R. § 109.21(c)(4)(ii) (2003) *with* 11 C.F.R. § 109.21(c) (2006). Moreover, if the Commission had meant to establish that a handbill is always a "public communication," it would have explained and justified this in the explanation and justification, *see* 2 U.S.C. § 438(d)(1) (2002); *cf. id.* § 437d(a)(8) (1986); *id.* § 438(a)(8), yet it did not. *See, e.g.*, 68 FED. REG. at 429.

Because the Mason campaign handbill is not a public communication, it is not Type 3 FEA. *See* 2 U.S.C. § 431(20)(A)(iii). This disposes of OGC's contention, *supra* at 3-4, that the handbill is subject to reporting requirements.

2. Reporting Requirements

Second, there is nothing to indicate that FECA subjects the Mason campaign to reporting requirements – either as a political committee, *see* 2 U.S.C. §§ 434(a)(4), 431(6), or otherwise – and the handbill would not change this, even if it were Type 3 FEA.

The requirement that a state or local candidate or officeholder pay for Type 3 FEA with money subject to FECA limits, prohibitions, and *reporting* requirements, *id.* § 441i(f)(1), does

[20] *Cited in* GCR at 6

not establish a reporting requirement that would not otherwise exist. *Cf. id.* § 434(c), (d), (g) (reporting requirements for independent expenditures). In other words, if, for example, FECA does not otherwise require a state or local candidate or officeholder to report, then the candidate or officeholder need not do anything to comply with the "reporting requirement" language of Section 441i(f)(1). Such a candidate or officeholder complies with this language by not reporting.

Were the Commission to hold otherwise, then just as federal political committees must report to the Commission, *see, e.g., id.* §§ 434(a)(4), 431(6), so would *every* state or local candidate or officeholder in America who does Type 3 FEA, *see id.* § 441i(f)(1) (citing 2 U.S.C. § 431(20)(A)(iii)), have to report as a federal political committee once the candidate or officeholder spent more than $1,000 in a calendar year on Type 3 FEA. *See id.* § 431(4)(A). Or at the very least, *every* state or local candidate or officeholder would somehow have to report *every* public communication – meaning *every* "communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising," *id.* § 431(22) – that refers to a clearly identified federal candidate and PASOs a candidate for the same office, *see id.* § 431(20)(A)(iii),[21] once the candidate or officeholder spent more than $1,000 in a calendar year on Type 3 FEA. *See id.* § 431(4)(A).

For these reasons Section 441i(f)(1) does not establish a reporting requirement that would not otherwise exist. One reporting requirement that does otherwise exist is the one for independent expenditures. *See id.* § 434(c), (d), (g). However, the Mason campaign handbill is not an expenditure, *supra* at 2-3, so it is not an independent expenditure, *see id.* § 431(17), and the independent-expenditure reporting requirement does not apply.

3. Parallel to 2 U.S.C. § 441i(b)(1)

Moreover, this result has the effect, in one respect, of treating state or local *candidates* and *officeholders* as Commission regulations treat state, district, or local *political-party* committees, or *associations or similar groups* of state or local candidates or officeholders.

The FECA section on state or local candidates and officeholders requires that they pay for Type 3 FEA only with federal money. *Id.* § 441i(f)(1) (citing 2 U.S.C. § 431(20)(A)(iii)).[22]

The FECA section on state, district, or local political-party committees, or associations or similar groups of state or local candidates or officeholders requires, with some exceptions, *see id.* § 441i(b)(2), that these entities pay for all FEA with federal money. *Id.* § 441i(b)(1).[23] Commission regulations then emphasize that, in determining whether these entities have

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[21] *See generally McConnell,* 540 U.S. at 170 n.64 (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972)).

[22] *See also* 11 C.F.R. § 300.71 (2002)

[23] *See also id.* § 300.32(a)(1)-(2) (2002)

sufficient "contributions" or "expenditures" to convert these entities into political committees, *see generally id.* § 431(4) – which would mean they would then have to report "contributions" and "expenditures," *see id.* § 434 – these entities' payments of federal money or Levin funds for FEA count as "expenditures" only if those payments are "expenditures" under FECA. *See* 11 C.F.R. § 300.36(a)(2) (2002) (citing 2 U.S.C. § 431(9)); *see generally supra* at 2 n.5. Thus, such entities' FEA does *not* establish a reporting requirement that would not otherwise exist. On the one hand, if the FEA is already an expenditure, then it already counts toward political-committee status. *See* 2 U.S.C. § 431(4). On the other hand, if the FEA is not an expenditure, then it does not count toward political-committee status, and it has to be reported only[24] if the state, district, or local political-party committee, or association or similar group of state or local candidates or officeholders already has to report as a federal political committee. *See id.;* 11 C.F.R. § 300.36(a)(2).

Thus, the conclusion that Section 441i(*f*)(1) does not establish a reporting requirement that would not otherwise exist, *supra* at 5-6, is parallel to what the Commission has already established under Section 441i(*b*)(1). While the Commission did not include language similar to the language in Section 300.36(a)(2) in the regulation for state and local candidates and officeholders, *see id.* § 300.71, there is no other indication that the Commission intended to construe the identical federal-money requirements of Sections 441i(*b*)(1) and 441i(*f*)(1) differently.

III. CONCLUSION

With the foregoing understanding, we voted to take no further action and close the file in this matter.

December 11, 2006

Michael E. Toner
Chairman

David M. Mason,
Commissioner

Hans A. von Spakovsky
Commissioner

[24] If political speech is not an "expenditure," *see, e.g.*, 2 U.S.C. § 431(9)(B), 11 C.F.R. § 100.148, *supra* at 2 n.5, then it is also not an "independent expenditure," *see* 2 U.S.C. § 431(17), and it is not subject to the independent-expenditure reporting requirement *See id.* § 434(c), (d), (g).